

**EUGENE S. DUARTE**  
Claimant

**AGCO CORPORATION**  
Respondent

**ZURICH AMERICAN INSURANCE CO.**  
Insurance Carrier

## ORDER

Claimant requested review of the February 10, 2010, preliminary hearing Order entered by Administrative Law Judge Bruce E. Moore. Melinda G. Young, of Hutchinson, Kansas, appeared for claimant. Larry Shoaf, of Wichita, Kansas, appeared for respondent and its insurance carrier (respondent).

The Administrative Law Judge (ALJ) denied claimant's preliminary hearing requests, finding that claimant failed to sustain his burden of proof that he suffered personal injuries by an accident or a series of accidents that arose out of and in the course of his employment with respondent.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the February 10, 2010, Preliminary Hearing and the exhibits, together with the pleadings contained in the administrative file.

Claimant requests review of the ALJ's denial of his request for preliminary hearing benefits, arguing that the ALJ held that claimant failed to prove an injury arose in the course of his employment on October 28, 2009, only because claimant was not employed by respondent on that date. Claimant argues, however, that pursuant to K.S.A. 2009

Supp. 44-508(d), the day claimant gave written notice to respondent of his work-related injuries is deemed to be his date of accident for his claim of a series of accidental injuries.

Respondent argues that notwithstanding the ALJ's discussion at the preliminary hearing concerning claimant's date of accident being 10 to 11 months after he last worked for respondent, the ALJ cited other reasons for finding that claimant failed to prove he suffered injuries by either an accident or a series of accidents that arose out of and in the course of his employment. Respondent contends the ALJ also held that claimant's contemporaneous medical records say nothing about a work cause or a work aggravation; that claimant's treatment was billed under his personal health insurance; that claimant was receiving short term disability payments; and that claimant never alleged a causal relationship between his work duties and his shoulder complaints until October 28, 2009. Accordingly, respondent asks this Board Member to affirm the Order of the ALJ denying claimant's request for preliminary hearing benefits.

The issue for the Board's review is: Did claimant suffer personal injuries by either an accident or a series of accidents that arose out of and in the course of his employment with respondent?

#### **FINDINGS OF FACT**

Claimant was employed beginning in April 2008, as a machine operator at respondent, a company that manufactures farm equipment. Claimant would take parts out of a tub, put them into the jaws of the machine, and hit a button. He would then inspect the parts. The parts would be 12 to 15 inches in diameter and 2 to 4 inches in width, and some of them would weigh as much as 35 pounds. At some point during his employment, claimant alleges he injured his bilateral shoulders. Claimant could not recall a specific date or dates that he injured his shoulders—only that they hurt and he kept on working. Nevertheless, claimant testified that both of his shoulder injuries started with what felt like a rubber band snapping, first in his left shoulder and later in his right shoulder, while working.

Claimant first sought medical treatment for his shoulder pain in October 2008 from Gino Salerno, P.A. Mr. Salerno sent him to Dr. Scott Goin, an orthopedic specialist. Dr. Goin told him he had torn rotator cuffs in both shoulders and recommended surgery. Claimant opted to have surgery on each of his shoulders, and Dr. Goin performed surgery on his left shoulder on December 4, 2008, and on his right shoulder on March 24, 2009. Claimant had physical therapy after each surgery, and he was released from treatment in June 2009. Claimant testified that he was laid off from respondent in June 2009, a few days before he was released by his doctor to return to work.

Claimant testified that he continues to have problems with his left shoulder. He was told by Dr. Pedro Murati that he needed reconstructive surgery on his left shoulder. Claimant testified he now has a bone-on-bone sensation in his left shoulder that is different

than the snapping sensation he felt while he was working at respondent. He also has limited range of motion in his right shoulder and he cannot lift like he used to.

Claimant testified that in either 2000 or 2001, he jumped off a cliff into some water. He said as he hit the water, his arms got pulled up, injuring both shoulders. Claimant did not seek medical treatment for his shoulders at that time. He said he went to the drugstore and bought two slings and wore them for a couple of weeks. Eventually his symptoms resolved and he was able to return to his normal function in two to four months. He testified he was not experiencing any symptoms in either shoulder when he started working for respondent in April 2008.

The medical records show that claimant was seen by Mr. Salerno on October 9, 2008. Claimant was complaining of shoulder pain but gave no causation history. Claimant saw Mr. Salerno again on October 15, 2008, at which time he gave a history of rotator cuff injuries. Mr. Salerno's note states that claimant "has been seen for this problem on and off for awhile."<sup>1</sup> Claimant was referred to an orthopedist, and he first saw Dr. Goin on October 31, 2008. Dr. Goin's medical record of that date indicates claimant told him he did not recall a specific injury. Claimant saw Dr. Jerold Albright on December 1, 2008, at which time he reported that he'd had shoulder problems for a long time and gave a history of initially injuring his left shoulder in 2000 when he jumped off a cliff into a lake. Claimant told Dr. Albright that his left shoulder has bothered him ever since, and later his right shoulder also became painful. Dr. Goin's operative report of December 4, 2008, indicated that claimant said he had been having left shoulder pain for several months. The off-work slips for claimant dated December 17, 2008, and December 29, 2008, were marked, respectively, that claimant's condition was the result of "[o]ther injury or accident" and "[i]njured off the job," even though a box was available to check for "[i]njured on the job at AGCO Corp."<sup>2</sup>

On June 10, 2009, claimant was released from medical treatment by Dr. Goin. At that time, claimant denied having any problems or complaints. After examining claimant's right and left shoulders, Dr. Goin indicated that claimant had excellent results, and claimant was then given a full release to return to work.

Claimant was seen by Dr. Pedro Murati on February 1, 2010, at the request of claimant's attorney. Claimant told Dr. Murati that he was injured due to the repetitive nature of his job duties. Claimant told Dr. Murati about his shoulder injuries that occurred in 2000 when he jumped off a cliff. Claimant told Dr. Murati that he was placed into a cast at that time and the pain resolved until he was recently injured. Dr. Murati's report states: "This claimant's current diagnoses are within all reasonable medical probability, a direct

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<sup>1</sup> P.H. Trans., Cl. Ex. 1 at 2.

<sup>2</sup> P.H. Trans., Resp. Ex. D at 1, 3.

result from the work-related injury that occurred on 10-16-08, during his employment with Hadco [*sic*] Corporation.”<sup>3</sup>

#### PRINCIPLES OF LAW

K.S.A. 2009 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 2009 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.<sup>4</sup> Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.<sup>5</sup>

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.<sup>6</sup>

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<sup>3</sup> P.H. Trans., Cl. Ex. 1 at 25.

<sup>4</sup> K.S.A. 2009 Supp. 44-501(a).

<sup>5</sup> *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 278, 899 P.2d 1058 (1995).

<sup>6</sup> *Id.* at 278.

An accidental injury is compensable under the Workers Compensation Act even where the accident only serves to aggravate a preexisting condition.<sup>7</sup> The test is not whether the accident causes the condition, but whether the accident aggravates or accelerates the condition.<sup>8</sup> An injury is not compensable, however, where the worsening or new injury would have occurred even absent the accidental injury or where the injury is shown to have been produced by an independent intervening cause.<sup>9</sup>

K.S.A. 2009 Supp. 44-508(d) states in part:

In cases where the accident occurs as a result of a series of events, repetitive use, cumulative traumas or microtraumas, the date of accident shall be the date the authorized physician takes the employee off work due to the condition or restricts the employee from performing the work which is the cause of the condition. In the event the worker is not taken off work or restricted as above described, then the date of injury shall be the earliest of the following dates: (1) The date upon which the employee gives written notice to the employer of the injury; or (2) the date the condition is diagnosed as work related, provided such fact is communicated in writing to the injured worker. In cases where none of the above criteria are met, then the date of accident shall be determined by the administrative law judge based on all the evidence and circumstances; and in no event shall the date of accident be the date of, or the day before the regular hearing. Nothing in this subsection shall be construed to preclude a worker's right to make a claim for aggravation of injuries under the workers compensation act.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.<sup>10</sup> Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2009 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.<sup>11</sup>

### **ANALYSIS**

Claimant initiated this claim by filing with the Division of Workers Compensation an Application for Hearing on November 5, 2009. That form requires the applicant to state the

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<sup>7</sup> *Odell v. Unified School District*, 206 Kan. 752, 758, 481 P.2d 974 (1971).

<sup>8</sup> *Woodward v. Beech Aircraft Corp.*, 24 Kan. App. 2d 510, Syl. ¶ 2, 949 P.2d 1149 (1997).

<sup>9</sup> *Nance v. Harvey County*, 263 Kan. 542, 547-50, 952 P.2d 411 (1997).

<sup>10</sup> K.S.A. 44-534a; see *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, *rev. denied* 286 Kan. \_\_\_, (2008); *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

<sup>11</sup> K.S.A. 2009 Supp. 44-555c(k).

“[d]ate of accident/disease (give beginning and ending dates if a series).” Claimant did not give a beginning and ending date. Claimant is now contending he suffered a series of accidents and the October 28, 2009, date alleged in his Application for Hearing was given to comply with K.S.A. 2009 Supp. 44-508(d) because that was the date claimant gave written notice to his employer of the injuries.<sup>12</sup> This is also the position claimant took at the preliminary hearing.<sup>13</sup> Nevertheless, the Division’s Form E-1 Application for Hearing specifically asks for the beginning and ending date of any alleged series. The form does not ask for the single date of accident for a series as provided in K.S.A. 2009 Supp. 44-508(d).

Although claimant is alleging a series of work-related accidents, his testimony describes two separate specific incidents, one to each shoulder.

Q. [by claimant’s attorney] And at some point during the course of your employment, did you injure yourself?

A. [by claimant] Yes, I did.

Q. What body parts were injured?

A. I felt like a rubber band getting snapped in my left shoulder, and the next time it was my right shoulder.

Q. So left and right shoulder injuries?

A. Yes, ma’am.

Q. And is there a specific date—let’s start with your left shoulder, a specific date that you injured your left shoulder?

A. I don’t really remember. I mean, it just hurt, and just keep on working. It was painful, but I just kept working. It broke me down, but I kept on working.

Q. Did the pain continue over time?

A. Yeah, and then it happened, you know, at times I would miss the jaw, you have all of this weight and you have to reach into it, and if you don’t hit it right, the jaws may stick out so far the weight is snapping the ends. When it did get to happening I got to where I would tell the boss, I would need to take a break. So I would go walk around the shop.

Q. With regard to your right shoulder, we just talked about your left, was there a specific day or incident that you can point to and say, that’s when I injured my right shoulder?

A. No, not really, because it started out just a snapping pain, you know.<sup>14</sup>

Claimant did not describe any worsening of his injuries or symptoms from performing his regular job duties.

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<sup>12</sup> Claimant’s Brief at 2 (filed March 15, 2010).

<sup>13</sup> P.H. Trans. at 7, 26.

<sup>14</sup> *Id.* at 13-15.

Q. [by claimant's attorney] Would you continue to work after experiencing that snapping pain?

A. [by claimant] Yes, at first.

Q. Would the pain and symptoms increase with activity.

A. No, because you just kind of learned how to move yourself to where, you know, it just—it was—it would just stop for a little while and then a few days later might do it again, but it went on for a few months.<sup>15</sup>

None of claimant's treating physicians related claimant's shoulder injuries to his work with respondent. And Dr. Murati, who did provide claimant a favorable causation opinion, referenced a single accident date of October 16, 2008, not a series of accidents.

Claimant's date of accident can only be October 28, 2009, if he suffered a series of accidents. Based on the record presented to date, claimant has failed to prove a series of accidents at work.

### **CONCLUSION**

Claimant failed to prove he suffered personal injury by a series of accidents that arose out of and in the course of his employment with respondent.

### **ORDER**

**WHEREFORE**, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Bruce E. Moore dated February 10, 2010, is affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of May, 2010.

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HONORABLE DUNCAN A. WHITTIER  
BOARD MEMBER

c: Melinda G. Young, Attorney for Claimant  
Larry Shoaf, Attorney for Respondent and its Insurance Carrier  
Bruce E. Moore, Administrative Law Judge

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<sup>15</sup> *Id.* at 15.